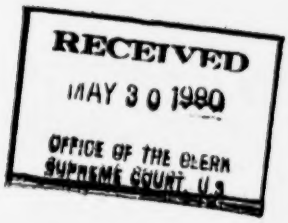
IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979



No. 79-1751

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

-against-

THOMAS CONYERS,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Pursuant to Rule 53(1) of the Rules of this Court, motion is hereby made that the respondent be allowed to proceed in forma Pauperis before this Court. Respondent's affidavit in support of this application is annexed hereto.

Dated: New York, New York
May 28, 1980

Respectfully submitted,

Philip L. Weinstein

PHILIP L. WEINSTEIN
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The Legal Aid Society
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Attorneys for Respondent

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

THOMAS CONYERS, being duly sworn, deposes and says:

I am respondent herein and make this affidavit in support of my application to proceed in forma pauperis in connection with the filing of the brief in opposition to the petition for a writ of certiorari.

I am presently free on bail pending a final determination of this case.

I am without funds to pay the cost of printing my brief in opposition and retaining counsel.

In the New York State Appellate Courts, I was allowed to proceed in forma pauperis and was represented by counsel associated with the Legal Aid Society of the City of New York. Such counsel have agreed to continue to represent me in this Court without expense to me.

WHEREFORE, it is respectfully requested that the application for leave to proceed in forma pauperis be granted.

Thomas Conyers
THOMAS CONYERS

Sworn to before me this
6th day of May, 1980

Nathan Rosenblum

NATHAN ROSENBLUM
Notary Public, State of New York
No. 24-8654120
Qualified in Kings County
Commission Expires March 30 1982

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are set forth in the Petition and are contained in petitioner's Appendix.

JURISDICTION

Respondent contests the jurisdiction of this Court for the reasons set forth in this brief.

QUESTION PRESENTED

Whether this Court should review the decision of the New York Court of Appeals, that cross-examination of a criminal defendant for impeachment purposes, concerning his post-arrest silence, in the absence of Miranda warnings, violates due process, because the decision below is based on independent and adequate state grounds, does not present a significant constitutional question and is in accord with established federal constitutional principles.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable provisions are set forth in the Petition.

STATEMENT OF THE CASE

The Prosecution's Case

On August 28, 1975 at about 1:30 p.m. MARION DANTZLER, a livery cab driver, was talking to GRACE JOHNSON, his friend of two and a half years, outside of 328 East 126th Street in Manhattan. They had been talking for about a half-hour when two young men approached and ordered them at gunpoint to "step inside." After both Dantzler and Johnson had been bound with rope, the men, subsequently identified as respondent and Saunders, removed the money from Dantzler's pockets and took Johnson's black drawstring bag containing money and a key. Initially Dantzler reported that between $300 and $350 had been taken from him, but at trial he reduced his claimed loss to $150. Johnson testified that "close to $200" had been taken from her. Upon obtaining their money, the men departed.

It took Dantzler three to four minutes to untie himself. As he emerged from the building, he saw respondent and Saunders, who were looking back at him, turn the corner of 126th Street. Dantzler started to chase them on foot, but when he saw FRANK MOREAU in his tow truck, Dantzler persuaded Moreau to follow the two men. Driving in reverse, Moreau drove to 125th Street and Second Avenue, where he stopped at a red light. Dantzler jumped off the truck and resumed his chase by foot. Suddenly, one of the men stopped and fired at Dantzler. According to Moreau, it was respondent. According to Dantzler, Saunders fired the shot and then, as they continued to run, gave the gun to respondent.

Since the men were running against the traffic, Moreau was unable to follow them and drove in search of a police officer. Officers NICHOLAS GARCIA and ERNEST JACOBOWITZ stopped Moreau when he drove through a red light. As Moreau was explaining the reason for his haste, he spotted respondent, gun in hand, on Third Avenue and 124th Street. The officers drove towards respondent, stopped alongside him, exited from their patrol car and ordered him to halt. When respondent complied and dropped the weapon, he was arrested, immediately handcuffed and driven to the precinct. Jacobowitz estimated that one minute elapsed from the time they first observed respondent until they arrested him. An additional minute and a half elapsed from the time of the arrest until they entered the precinct.

Although the police report indicated that $500 was taken from Dantzler and Johnson, only $181 was recovered from respondent and Saunders. A purse was also recovered from respondent and a piece of rope was found on Saunders.

During the chase, Johnson remained bound in the building. Eventually, a woman she knew as "Cookie" came into the building and cut the rope. Johnson did not, however, mention Cookie's involvement to the police and first mentioned her name to the prosecutor during a February, 1976 interview. At trial CHINA JONES testified that she was known as Cookie and had untied Johnson.

The Case for the Defense

On August 27th RESPONDENT, who was twenty-five at the time of the trial, placed a fifty cent bet on the number fourteen with Marion Dantzler. Upon being informed that the number had "hit," respondent asked his friend Arthur Saunders to drive him to Dantzler's "numbers spot" on the third floor of 320 East 126th Street. When they entered Dantzler's apartment, Dantzler denied that he owed respondent any money. Following a brief argument, Dantzler relented. Pointing to a pouch on the table, Dantzler said, "Okay, go get the money." Respon-

dent testified that he was entitled to $300.

When he reached for the pouch, however, Dantzler drew a gun. Respondent wheeled around and knocked the gun from Dantzler's hand. The gun discharged when it hit the floor. Respondent picked up the gun and placed it and the pouch in his pocket. To prevent Dantzler from following them, Saunders tied his hands with some rope found on the floor.

Respondent and Saunders were walking towards Saunders's car, but they started to run when Dantzler emerged from the building screaming that he wanted his gun back. Some police officers appeared and Dantzler yelled to them that he had been robbed. Respondent was arrested and told, at that time, that he was being arrested for robbery, possession of a weapon, assault and attempted murder. There is no indication in the trial record when, if ever, Miranda warnings were given to respondent.

The extensive cross-examination by the prosecutor of respondent concerning his post-arrest silence, as well as her comments in summation, are set forth by Petitioner in the Appendix. Pet. App. pp. 43a-46a.

ARTHUR SAUNDERS'S testimony concerning this incident was substantially the same as respondent's. As she had done with respondent, the prosecutor extensively cross-examined Saunders about his post-arrest silence.

The case was submitted to the jury at 3:18 p.m. and deliberations continued until 11:00 p.m., when the jury was sent to a hotel for the night. A verdict finally was reached the next afternoon at 1:00 p.m.

OPINION BELOW

The New York Court of Appeals held that cross-examination of respondent, for impeachment purposes, concerning his silence at the time of arrest is violative of the due process clauses of the State and Federal Constitutions. That holding was based

on alternative and independent due process theories.

The first rationale relied on Doyle v. Ohio, 426 U.S. 610 (1976). Unlike Doyle, however, there was no evidence that the police had given respondent any Miranda warnings. Nonetheless, "for purposes of due process analysis based on the unfairness of capitalizing upon the accused's accurate appreciation and exercise of his basic constitutional rights," the court deemed it to be irrelevant "whether that knowledge was imparted by the police, as is required by law, or was absorbed from our common culture." In either situation, the use of an accused's post-arrest silence for impeachment purposes violates due process. The alternative rational for the decision was that "Because of the low probative value which may reasonably be attached to silence, the State's interest in utilizing that evidence for impeachment purposes is correspondingly weakened and will not justify the imposition of even so attenuated a penalty on the exercise of a defendant's right to remain silent."

The court amended its remittitur to reflect that there was "necessarily passed upon a question under the Constitution of the United States." The remittitur did not indicate, however, whether both of the alternative rationales were controlled by the Federal Constitution.

Reasons For Denying The Writ

I.

This court has long "adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." Herb v. Pitcairn, 324 U.S. 117, 125 (1945). If the state court rests its decision "on both state and federal grounds, either of which would have been dispositive," review by this Court is barred. Zacchini v. Scripp-Howard Broadcasting Co., 433 U.S. 562, 568 (1977). Here, the decision below was based on adequate and independent

state grounds and the petition should be denied for that reason.

Despite references in the opinion below to the state constitution [49 N.Y.2d at 179-80, Pet. App. p. 5a & 6a], petitioner asserts that the due process holding was predicated solely upon Doyle v. Ohio, 426 U.S. 610 (1976). That argument is based upon the court's amendment of its remittitur to state "that there was presented and necessarily passed upon a question under the Constitution of the United States." Pet. p. 9, f.n. Petitioner characterizes the alternative holding of the court as grounded upon a substantial and novel expansion of the Fifth Amendment privilege against self-incrimination. Pet. p. 11. The defect in petitioner's argument is that it is premised on a misinterpretation of the court's opinion. The opinion is grounded on alternative due process theories, only one of which turns on Doyle v. Ohio, supra. The second rationale relied upon by the court is based on due process considerations predicated on adequate and independent state law. Such a reading of the court's opinion is supported by an examination of the authorities relied upon and is corroborated by subsequent opinion of the Court of Appeals in People v. Dawson, ____N.Y.2d____ (5/16/80). This interpretation is also consistent with the amendment of the remittitur.

The alternative rationale of the court below, which required a balancing of probative value against due process considerations, is based on an analysis absent from Doyle v. Ohio, supra. There, this Court declined to express an opinion on the probative value for impeachment purposes of an accused's post-arrest silence. 426 U.S. 617-8, f.n. 8. Nor did this Court express any view on due process considerations other than those flowing from giving a suspect Miranda warnings. Thus, the alternative due process rationale was not reached on constraint of Doyle v. Ohio, supra. Moreover, it was not

based on principles of federal constitutional law. Rather, the court relied on well established independent principles of state law.

The initial premise in the court's alternative due process rationale was that any attempt to penalize a person for the exercise of the right to remain silent in the face of interrogation must be scrutinized with extreme care. 49 N.Y. 2d at 180, Pet. App. pp. 6a-7a. That principle is firmly rooted in state law and it was "for this reason that in New York it has long been the law that evidence of silence at the time of arrest may not be used as part of the prosecution's direct case." 49 N.Y.2d at 180, Pet. App. p. 7a. The decision in which that principle was established, People v. Rutigliano, 261 N.Y. 103 (1933), long preceded Griffin v. California, 380 U.S. 609 (1965), which the court below interpreted as establishing a similar and parallel principle on constitutional grounds.* Nonetheless, the court acknowledged that neither decision resolved the question before it, although the considerations underlying both were applicable. Applying these parallel and independently derived considerations, the court concluded that using post-arrest silence for purposes of impeachment constituted at the very least, an attenuated penalty on the exercise of a defendant's right to remain silent.** 49 N.Y.2d 182; Pet. App. p. 9a.

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* Petitioner's contention that the court's penalty analysis was supported by exclusive reliance on Griffin v. California, 380 U.S. 609 (1965) [Pet. p. 12] ignores this extensive discussion of People v. Rutigliano, 261 N.Y. 103 (1933).

** Contrary to petitioner's allegations [Pet. p. 9], the court did not abandon People v. Rothschild, 35 N.Y.2d 355 (1974) [holding probative a police officer's silence in the face of accusations where officer was under a duty to inform his superiors of his undercover activities]. The court specifically referred to that decision as an example of circumstances in which the probative value of post-arrest silence might outweigh the due process considerations. 49 N.Y.2d at 181, Pet. App. p. 8a.

To be balanced against this due process consideration was the probative value of such silence. In finding that post-arrest silence was of low probative value the court relied on its own reasoning and an examination of the facts in this case. Special emphasis was placed upon the fact that since appellant was arrested gun in hand any explanation he gave was likely to prove futile. In addition, the court observed that many people in "our society" react to police with suspicion and distrust. 49 N.Y.2d at 182, Pet. App. p. 9a. Apart from the court's own reasoning process, the only authorities referred to by the court were "see" citations to United States v. Hale, 422 U.S. 171 (1975), and a law review comment. Clearly, then, the court's conclusion that the silence was of low probative value was based on its own examinations of the evidence, rather than on federal constitutional principles.

Although the alternative holding refers to both the state and federal right against self-incrimination, the decision is based on due process considerations. Any ambiguity with respect to that question was resolved in People v. Dawson, _____N.Y.2d____ (5/16/80) (Slip op. p. 12), where the court, in an opinion by Judge Gabrielli, who also authored the majority opinion in this case, described the court's holding as follows:

> In Conyers, we held that a defendant's silence at or after the time of his arrest may not be used to impeach his testimony at trial. Although we relied upon modern principles of due process in reaching that conclusion, we stressed as an alternative rationale (id., at p. 181, n. 2), that a defendant's silence in the presence of his accusers is of such low probative value that its usefulness as impeachment evidence must be deemed to be outweighed by the due process considerations which militate against its use [emphasis added].

Petitioner incorrectly assumes that by amending the remittitur the Court of Appeals acknowledged that Doyle, and therefore the United States Constitution, was the predicate for its due process holding. Pet. p. 9, f.n. Such a

conclusion would be justified if the court's decision was based on a single rationale. It is not warranted where, as in this case, the decision is based on alternative grounds, only one of which implicates the United States Constitution. Under such circumstances the court must pass upon the federal constitution, even though the alternative holding is entirely based on state law. Therefore, it was appropriate for the court to amend its remittitur to indicate that a federal constitutional question was passed upon. Such an amendment is consistent, however, with the existence of an alternative holding which is not predicated on the federal constitution. Thus, the amended remittitur in this case does not support petitioner's interpretation of the opinion below.

In sum, when the court "scrutinized with extreme care" the use of post-arrest silence for impeachment purposes and held that because of its low probative value it should not be used for that purpose, it was applying well established and independent due process principles of state law, adequate to require a reversal of respondent's conviction apart from any violations of federal constitutional rights. This Court is barred from reviewing such a decision and therefore, the Petition should be denied.

II.

Relying on Doyle v. Ohio, 426 U.S. 610 (1976) and Jenkins v. Anderson, ____U.S.____ (argued 1/8/80), petitioner argues that review should be granted in this case because it presents the "last of the three recurring factual situations" involving the use for impeachment of an accused's pretrial silence. Pet. p. 10. Unlike the impeachment of a defendant by his post-arrest silence following Miranda warnings or pre-custody silence, the use of a defendant's post-arrest silence prior to Miranda warnings has not generated numerous opinions in the lower appellate courts. From the absence of such opinions and differing views, it can be concluded, contrary to petitioner's characterization, that the issue presented by this case does not present

a recurring factual situation needing resolution by this Court.

Before this Court accepted for review the issue presented by Doyle v. Ohio, supra, many lower appellate courts had expressed views, often differing, on the use of post-arrest silence. E.g. United States v. Hale, 422 U.S. 171, 173 f.n. 2 (1975) [listing conflicting opinions of the United States Courts of Appeals]; Compare State v. Anderson, 110 Ariz. 238, 517 P.2d 508 (1973), with People v. Queen, 8 Ill.App.3d 858, 290 N.E.2d 631 (1972). Similarly, a body of lower appellate court law on the use of a defendant's pre-arrest silence for impeachment had developed before Jenkins v. Anderson, supra, was accepted for review. E.g. Bradley v. Jago, 594 F.2d 1100, 1103 (6th Cir. 1979); Compare Robeson v. State, 39 Md.App. 365, 386 A.2d 795 (1978), with People v. Sheperd, 37 Col.App. 336, 551 P.2d 210 (1976).

In contrast to the issues presented in both Doyle and Jenkins, the issue presented by this case has not resulted in numerous and conflicting opinions by lower appellate courts. Neither the court below nor petitioner, either before the New York Court of Appeals or in this Court, referred to any such decisions. To our knowledge four other courts have written on the subject and all agree with the New York Court of Appeals that post-arrest silence, even absent Miranda warnings, is too ambiguous to be used as a basis for impeachment. United States v. Nunez-Rios, ____F.2d____(2d Cir. Slip op. May 22, 1980) [cross-examination and comment by prosecutor for purposes of impeachment on silence of a defendant after arrest but before receiving Miranda warnings improper, but harmless error]. Bradford v. Stone, 594 F.2d 1294 (9th Cir. 1979) [violation of Doyle, even absent Miranda warnings, where defendant questioned on post-arrest failure to say anything about his alibi defense to police, but found to be harmless beyond a reasonable doubt]; United States ex rel. Allen v. Rowe, 591 F.2d 391 (7th Cir. 1979);

[cross-examination of defendant on his post-arrest silence, prior to Miranda warnings, to impeach justification defense violated Fifth Amendment right to remain silent]; Leon v. Kuhlmann, 443 F.Supp. 50, 56 (E.D.N.Y. 1977) [holding silence which occurred after arrest but before Miranda warnings to be insolubly ambiguous and, therefore, an improper area for the prosecutor to have explored, but harmless error in that case].

Unlike the Doyle and Jenkins situations, the issue presented by this case has generated few opinions and no divisions of views. From this fact, it can be concluded that the issue is not of great moment, nor a situation of common concern to criminal prosecutions throughout the United States. Since petitioner has failed to demonstrate that this case presents a significant constitutional question, review should be denied.

III.

The sole distinction between this case and Doyle v. Ohio, 426 U.S. 610 (1976), and the source of the split in the courts below, was the failure of the arresting officer to give respondent Miranda warnings at the time of his arrest. In holding that omission to be irrelevant,* the court below relied on the observation that "it is a matter of common knowledge that a person who is arrested is not required to speak to the police, and that his silence may not be used against him." 49 N.Y.2d at 180, Pet. App. p. 6a. If the "common knowledge" thesis is accurate, the court below correctly applied the dictates of Doyle v. Ohio, supra to the facts found.

The assumption that the right to remain silent upon arrest is a matter of common knowledge is grounded on numerous decisions of other appellate courts, as well as empirical data. Thus

* Identical conclusions have been reached by the other courts that have considered the relevance of this distinction. United States v. Nunez-Rios, ___F.2d___ (2d Cir. Slip. op. May 22, 1980. Bradford v. Stone, 594 F.2d (9th Cir. 1979); United States ex rel. Allen v. Rowe, 591 F.2d 391 (7th Cir. 1979); Leon v. Kuhlmann, 443 F.Supp. 50, 56 (E.D.N.Y. 1977).

in Kelley v. United States, 236 F.2d 746, 749 (D.C. Cir. 1956), the court quoted from State v. Hester, 137 S.C. 145, 185, 134 S.E. 885, 898-9:

> ...members of the bar have cautioned their clients not to discuss their cases with those with whom they came in contact, unless absolutely assured of their friendships, and many good lawyers have advised clients to refrain from talking at all. This has been the practice so long that it has become a well-known fact to our people generally.

See McCarthy v. United States, 25 F.2d 298, 299 (6th Cir. 1928) [common knowledge that after arrest a person in custody has a right to say nothing]; Michigan v. Tucker, 417 U.S. 433, 439 (1974)(Rehnquist, J.) [Today, "virtually every schoolboy is familiar with the concept"].

Both Kelley and McCarthy were decided prior to this Court's decision in Miranda. Given the wide discussion of Miranda in the media and the many television programs and movies depicting police officers warning suspects of their right to remain silent, it is even more likely that citizens are aware of these rights at the present time. And it is especially likely that respondent was aware of these rights since he had been arrested and prosecuted twice after this Court decided Miranda and before his arrest in this case.

The "common knowledge" theory is also supported by the testimony of defendants as reported in several recent New York cases. For example, in People v. Norris, ____A.D.2d____, New York Law Journal, May 2, 1980, p. 13, col. 6,(2d Dept.), after the police read the Miranda rights to the accused, he responded, "I know my rights better than you. I just got out of jail." And in People v. Adams, 73 A.D.2d 525, 422 N.Y.S.2d 406 (1st Dept. 1979), the defendant gave a similar explanation for his failure to say anything to the police:

> ...I did not answer no questions, I told him until I have an attorney. I know this by me being there before. I know my little rights. I can protect myself....

Assuming Doyle is aimed at the unfairness of "trapping" an arrestee encouraged to remain silent by the implicit guarantee contained in Miranda, it is no less unfair to trap an arrestee

relying on "common knowledge" of those same rights. Having found that the right to remain silent is a matter of common knowledge, the court below correctly applied established constitutional principles to that conclusion.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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Attorneys for Respondent

May, 1980